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Nos. 00-1751, 00-1777 and 00-1779

IN THE

# Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*,
*Petitioners*

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*

---

HANNA PERKINS SCHOOL, *et al.*,
*Petitioners*

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*

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SENEL TAYLOR, *et al.*,
*Petitioners*

v.

DORIS SIMMONS-HARRIS, *et al.*,
*Respondents*

---

**On Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit**

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## BRIEF OF THE REACH ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a program designed to create additional educational options for children of parents who lack the means to afford alternatives to their distressed public schools violates the Establishment Clause of the First Amendment to the United States Constitution.

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## INTEREST OF AMICUS[*]

The REACH Alliance is a membership organization composed of individuals and organizations interested in

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[*] Counsel for the *Amicus Curiae* authored this brief in its entirety. No person or entity other than the *Amicus Curiae* or its members made a monetary contribution to the preparation or submission of this brief.

bringing about enhanced opportunities for Pennsylvania parents to send their children to the kindergartens, elementary schools and secondary schools which best suit the needs of those children. It has been a principal advocate of "school choice" reforms in Pennsylvania, such as the Educational Improvement Tax Credit, 24 P.S. §20-2001-B, *et seq.*

Organizational members of the REACH Alliance include: The Commonwealth Foundation; Minorities for Choice; The Pennsylvania Manufacturers Association; The Pennsylvania Family Institute; The Pennsylvania Catholic Conference; the Pennsylvania Knights of Columbus; Citizens for Educational Freedom; The Keystone Christian Education Association; and The Henkels Foundation.

Counsel of Record for all of the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

## SUMMARY OF ARGUMENT

Parents who exercise a constitutionally-protected liberty to choose to enroll their children in the public or nonpublic schools that, while meeting compulsory attendance obligations, best serve the needs of their children, may be furnished governmental assistance in defraying the costs of that schooling without violation of the Establishment Clause of the First Amendment.

## ARGUMENT

The United States Court of Appeals for the Sixth Circuit, in the decision below, has perpetuated two errors of



Establishment Clause jurisprudence that need to be put to rest.

The first of these errors is that legislatures that seek to equalize educational opportunities for *all* elementary and secondary school children, by defraying their educational costs, are furnishing institutional aid to religious enterprises.

The second of these errors is the notion that legislative efforts to equalize educational opportunities for *all* elementary and secondary school children must be examined in isolation, to determine if their effect is to advance religion, rather than in the context in which they were enacted – the State's overall allocation of resources between and among children attending public and nonpublic schools.

### A. THIS COURT'S *NYQUIST* AND *SLOAN* DECISIONS WERE PREMISED ON ERRONEOUS PRESUMPTIONS.

In 1973, in the companion cases of *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, and *Sloan v. Lemon*, 413 U.S. 825, this Court invalidated tuition reimbursement and tuition "grant" programs that had been adopted in the State of New York and in the Commonwealth of Pennsylvania.

The core of the Court's explanation of its reasoning in those cases can be found in footnote 38 in the *Nyquist* majority opinion:

> "*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton v. Richardson*, supra, in which federal aid was

made available to *all* institutions of higher learning, and *Walz v. Tax Comm'n*, supra, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of The Chief Justice that tuition grants are an analogous endeavor to provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools. Post, at 801-803. The grants to parents of private schoolchildren are given in addition to the right that they have to send their children to public schools "totally at state expense." And, in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools - a result wholly at variance with the Establishment Clause.

"Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 342 F Supp 399, 412-413 (SD Ohio), *affd*, 409 US 808, 34 L Ed 2d 69, 93 S Ct 61 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 USC §1651, impermissibly advance religion in violation of the Establishment Clause. See also n 32, supra."

413 U.S. at 782, n.38.



Three faulty presumptions are contained in this single passage:

1. That children whose parents have a fundamental right to choose a nonpublic school for them receive an extra public benefit when the State subsidizes their education, due to the fact that all children are *presumptively* to be considered as public school children.
2. That allowing parents to choose nonpublic schools for their children, with a lessened additional financial burden, is the equivalent of direct subsidization of their schools.
3. That the "beneficiaries" of a statute that lessens the financial burdens for parents, who are satisfying compulsory school attendance obligations, are the schools which the students attend, rather than the parents and their children.

It is profoundly offensive to parents who choose nonpublic schools for their children to be subjected to a legal presumption that their children "belong" in public schools, and that any other choice is a deviation from a government-sanctioned norm. Most nonpublic school parents are quite willing to make financial sacrifices to send their children to schools that are not 100% government-subsidized. Nor do those parents believe that their government is under an obligation to subsidize their choice of nonpublic schooling. But when government acts to offset some of the additional financial burdens those parents have assumed, it is tilting all common sense reality to say that government is according them an "extra benefit." Their children are receiving what public school children are receiving: an education that fulfills compulsory education requirements. They are not being paid

an amount in excess of the charge required to send their children to nonpublic schools.

The first flawed presumption of footnote 38 in *Nyquist* was given dispositive effect in *Sloan*, wherein the Court ruled that the Commonwealth of Pennsylvania had "singled out a class of its citizens for a special economic benefit." 413 U.S. at 832. That view is similar to saying that a coach is conferring a benefit on an athlete he or she has singled out for exemplary "added training" when that coach allows that athlete to stop running punitive wind sprints. Helping nonpublic school parents achieve parity in government-provided educational benefits is merely, in the words of former Chief Justice Burger, "simple equity." *Nyquist*, supra, at 803 (Burger, J., dissenting).

The second and third erroneous presumptions in *Nyquist's* footnote 38 are similar to one another in their misconception of the *purposes* of efforts to equalize educational opportunities for parents. The Court's view of such efforts is even more explicitly set forth in a subsequent passage in *Nyquist*, where the majority states that, "insofar as such benefits render assistance to parents who send their children to sectarian schools, their *purpose* and inevitable effect are to aid and advance those religious institutions." 413 U.S. at 793.That view allows the *Nyquist* majority to hold that a tuition reimbursement benefit for parents is government "sponsorship" or "financial support" of religion. 413 U.S. at 771.

The *Nyquist* majority further reveals its presumptive bias against measures that aid parents in meeting their educational obligations by broadly characterizing them as an example of "the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court." 413 U.S. at 785. There is thus little wonder – given the prism through



which the *Nyquist* majority viewed legislative efforts at equalizing educational benefits for parents – that the *Nyquist* Court decried such efforts, at length, as being "politically divisive," and therefore at odds with the overriding purposes of the Establishment Clause. 413 U.S. at 794-798. Such a formulation of the purposes of the Establishment Clause, coupled with a skewed view of the purposes of efforts to bring "simple equity" to the funding of educational options, fashioned a pernicious recipe for oppression of the choice of non-government education. If a substantial enough faction could politically oppose such efforts (however unjustly and through whatever mischaracterizations of their purposes), those efforts (however just and whatever their non-religious purposes) would violate our organic law and could not be countenanced.

Fortunately, however, this Court has already abandoned and discredited the presumption that efforts at assisting parents to make their own choices of where their children will be educated are intended as, or result in, impermissible subsidies to the schools which they choose. *Mitchell v. Helms*, 530 U.S. 793, 841-843 (O'Connor and Breyer, JJ., concurring). To the extent that *Nyquist's* presumptions about the purposes and effects of "true private-choice" programs (*Mitchell, id.* at 842) are no longer recognized as commanding a majority of this Court, *Nyquist's* continuing force as precedent should be explicitly overruled. This Court has not shrunk from eliminating wrongly decided precedent cases that were based on similarly erroneous presumptions that underlay unjust Establishment Clause rulings. See, *Agostini v. Felton*, 521 U.S. 203, 235 (1997); *Mitchell v. Helms*, supra, 530 U.S. at 837 (O'Connor and Breyer, JJ., concurring). Overruling the holding and reasoning of *Nyquist* will remove the pall of doubt from "scholarship" and "certificate" programs that honor parental choices between religious and non-religious educational

alternatives. Those programs now include the "G.I. Bill," 38 U.S.C. §3451, *et seq.*; Military Survivors' and Dependents' Educational Assistance, 38 U.S.C. §3500, *et seq.*; Federal Child Care and Development Block Grant certificates, 42 U.S.C. §9858, *et seq.*; and Pennsylvania's Educational Support Services Program, 24 P.S. §15-1501-C, *et seq.*

### B. The Court Below Erred in Assessing the Sectarian Effect of the Ohio Pilot Scholarship Program in Isolation from the State's Overall Efforts at Equalizing Educational Opportunities.

The State of Ohio will spend approximately $7.4 billion in State funds alone on education in its Fiscal Year 2002. State of Ohio Executive Budget, p. E-106. (Available online at http://www.ode.state.oh.us/legislative/Links/EDU_Budget.pdf.) Of that amount, approximately $178 million (or about 2.4%) will be set aside for services for nonpublic school students. *Id.* at p. E-105. Ohio also grants the authority to its local taxing authorities to raise and spend public funds for public education purposes (including capital and operating expenditures).

The realities of the overall disparities in public spending on public v. private school options could not have been ignored by the Ohio General Assembly when it enacted the Ohio Pilot Scholarship Program. Those realities should not have been ignored by the Sixth Circuit below. *Simmons-Harris v. Zelman*, 234 F.3d 945, 958 (6th Cir. 2000).

By viewing a program aimed at remedying overall disparities in available opportunities totally in isolation from those portions of the State budget and education laws which created the disparities in the first place, the Court below



unjustly prejudiced the result in this case. Under the analytical approach adopted by the Court below, it will never be possible to remedy an existing legal disparity in the funding of educational opportunities without repealing and reenacting the entire Ohio Education Code.

The approach in *Mueller v. Allen*, 463 U.S. 388, 401-402 (1983), to the "statistical effects" of a facially neutral program that produced more use by parents who chose religiously-affiliated schools, is more fundamentally just than that employed by the Court below. In *Mueller*, this Court recognized the simple reality that, if "parents of children in private schools choose to take especial advantage of [the tax deduction for educational expenses], it is no doubt due to the fact that they bear a particularly great financial burden in educating their children." 463 U.S. at 402.

## CONCLUSION

For the foregoing reasons, your *amicus* respectfully supports the Petitioners in urging that the decision of the Court below be reversed.

Respectfully submitted,

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